IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-552

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

v.

SIERRA CLUB, ET AL.,
Respondents.

No. 75-581

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,
Petitioners,

v.

SIERRA CLUB, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE STATE OF UTAH AS AMICUS CURIAE

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BRIEF OF THE STATE OF UTAH AS AMICUS CURIAE

The State of Utah, appearing by its undersigned Attorney General, respectfully tenders this brief as *amicus curiae* for the consideration of this Court. The State supports the position presented by the Solicitor General on behalf of the Secretary of the Interior and urges this Court to reverse the decision of the United States Court of Appeals for the District of Columbia Circuit and to remand the case with instructions to affirm the Judgment of the District Court.

THE INTEREST OF THE STATE OF UTAH

The State of Utah contains one of the largest Federal coal-bearing areas in the United States. Although Utah is not specifically included in respondents' denomination of the so-called "Northern Great Plains Region," or in the Court of Appeals' somewhat different delineation of the "Northern Great Plains Province" (App. A, 2A), the decision of the court below poses a threat to the timely development of vast amounts of high quality low sulfur coal in Federal lands within the State. Apart from the fact that the Court of Appeals acknowledged that the "relevant geographic area for development still seems somewhat uncertain" (*id.*, 45A) and stated that "definition of the proper region for comprehensive development, and, therefore, the comprehensive impact statement should be left in the hands of the federal appellees" (*id.*, 45A-46A, n.33), there are a number of pending private applications for coal lease issuance and mining plan approvals before the federal petitioners that relate directly to the development of coal in the State of Utah.

Thus, according to the federal petitioners' national coal programmatic impact statement issued in final form as the *Final Environmental Impact Statement: Proposed Federal Coal Leasing Program* (hereinafter referred to as the Coal Leasing EIS) "it is apparent that interest in future Federal coal leasing will generally focus around coal deposits in Montana, Wyoming, Utah, and Colorado and to a lesser extent, North Dakota and New Mexico" (Coal Leasing EIS 1-83).[1] And, according to the federal petitioners' Bureau of

[1] A copy of the Coal Leasing EIS was lodged with the Clerk by the federal petitioners.

Land Management and U.S. Geological Survey, there are pending 14 federal preference right coal lease applications covering 39,091 acres of Federal lands in the State of Utah in which the recoverable coal reserves are estimated to amount to 599 million tons (*id.* at 1-81, Table 1-27).

Moreover, insofar as coal reserves held under Federal leases are concerned, the State of Utah is first among all the states in the number of such leases (195), the total acres leased (266,700) and—perhaps more importantly, in terms of environmental considerations—the size of underground (as distinguished from strippable) recoverable reserves (3,319 million tons) (*id.* at 1-81, Table 1-26). In 1972, almost twenty percent of all coal produced from federal leases and more than twenty-four percent of federal income from such leases, prospecting permits and licenses came from mines in the State of Utah (*id.* at 1-80, Table 1-23). It is also worth noting that all coal in Utah is mined by underground methods, and that coal is of high quality and low sulfur content.

The State of Utah is fully committed to achieving and maintaining the most rigorous level of pollution control that is consistent with the best interests of all of its citizens in all portions of the State. One means which the State has utilized to meet its commitments in this regard has been to require that three new electric power generating facilities now under construction in Utah to meet our growing demands for energy only burn coal with an average sulfur content of 0.6 percent or less. Programs such as this depend upon the availability of low sulfur coal in adequate supply. The decision below constitutes a genuine threat to both the economic and environmental health of the State of

Utah and its citizens, and the State therefore has a clear interest in seeking reversal of the judgment of the Court of Appeals and a remand of the case with instructions to affirm the Judgment of the District Court.

ARGUMENT

The ruling of the lower court is in fundamental conflict with the determination of Congress and this Court's recent decision in *Aberdeen & Rockfish R. Co.* v. *SCRAP,* 422 U.S. 289 (1975) (hereinafter cited as *"SCRAP II"*) that Section 102(2)(C) of NEPA requires that an environmental impact statement be included "in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment," and that the "time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action." 422 U.S. at 320 (emphasis is the Court's). The District Court found that there "is no existing or proposed Federal regional program, plan, project, or other regional 'federal action' *within the meaning of NEPA Section 102(2)(C)* for the development of coal or other resources in the area defined by plaintiffs as the 'Northern Great Plains region'" (emphasis is the Court's). Although the court below accepted "the facts as found by the District Court" (App. A, 39A), including the finding with respect to the absence of any existing or proposed federal program, plan or other regional federal action concerning coal or other resource development in the so-called Northern Great Plains region, it nonetheless held that "comprehensive major federal action is contemplated in the Northern Great Plains" (*id.*) and it intervened to require the

federal petitioners to prepare a separate "regional" environmental impact statement covering all development of coal and related resources within the "region" so long as the federal petitioners continue "contemplating" private applications. This holding is directly contrary to this Court's recent *SCRAP II* decision that Section 102(2)(C) of NEPA does not require an impact statement if "no proposal, recommendation, or report" has been made by an agency with respect to the federal action in question. *Aberdeen & Rockfish R. Co.* v. *SCRAP,* 422 U.S. 289, 320-321 (1975).

The ruling of the court below also conflicts with decisions of circuit courts of appeals which have upheld impact statements limited to a specific proposed action even though such proposed action was acknowledged to be part of a more comprehensive project or program because the specific proposed project had independent utility so that its approval did not constitute a commitment on the part of the federal government to the more comprehensive project. *See, e.g., Sierra Club* v. *Stamm,* 507 F.2d 788 (C.A. 10, 1974); *Trout Unlimited* v. *Morton,* 509 F.2d 1276 (C.A. 9, 1974); *Jicarilla Apache Tribe of Indians* v. *Morton,* 471 F.2d 1275 (C.A. 9, 1973). The court below disagreed with these cases and held that an impact statement must assess, in a comprehensive manner, all actions and environmental impacts that might be related to the proposed action. In so ruling, the court relied upon *Conservation Society of Southern Vermont, Inc.* v. *Secretary of Transportation,* 508 F.2d 927 (C.A. 2, 1974), *vacated and remanded sub nom., Coleman* v. *The Conservation Society of Southern Vermont, Inc.,* "for further consideration in light of" *SCRAP II,* 44 U.S.L.W. 3199 (October 6, 1975). Although the Court of Appeals

purported to distinguish the cases in other circuits on the ground that those cases "involved the propriety of an injunction against an individual project pending completion of a regional [impact statement] or other study," and "[n]one of the cases involved a direct challenge to the need for a regional" impact statement (App. A, 39A. n.29), Judge MacKinnon in dissent aptly pointed out that this "is a classic example of a distinction without a difference" (*id.* at 65A). The fact that the decision below is a clear and unwarranted departure from the plain language of NEPA, this Court's *SCRAP II* decision and the decisions of other circuits concerning the required scope of environmental impact statements.

I. Congress Has Not Required Federal Agencies To Prepare "Regional" Impact Statements or Any Impact Statements in the Absence of a "Recommendation or Report on Proposals . . . For Major Federal Actions."

Section 102(2)(C) of NEPA expressly provides that federal agencies shall include "in every recommendation or report on proposals for legislation and other major Federal actions" significantly affecting the quality of the human environment a detailed statement concerning the effects of, and alternatives to, the "proposed action." There is no language on the face of the statute that requires a "regional" impact statement, and neither respondents nor the court below pointed to such language either in the body of NEPA itself or in the Act's legislative history. What is manifest from the face of the statute, however, is that an environmental impact statement is not required in the absence of a recommendation or report by a federal agency upon a "proposal for major Federal action." It is the recommendation or report on "*proposals* for

major Federal actions" that triggers the statutory command for a detailed statement of specified effects, alternatives and commitments of resources—all of which relate specifically to the "*proposed action,*" and none of which pertains to private applications pending before and being contemplated by federal agencies, such as the federal petitioners. Since there has been no federal proposal for regional action relating to development of coal anywhere in the United States, no regional impact statement is required by NEPA and the federal courts are not free to engraft such requirements onto the Act or to substitute their judgment for the federal agencies as to the wisdom of proceeding on a regional or any other basis.

II. The Decision of the Court of Appeals Is Contrary to This Court's SCRAP II Decision.

This Court's *SCRAP II* decision plainly held that an environmental impact statement is not required prior to an agency's recommendation or report on a proposal for major federal action. In that case, decided after the decision of the Court of Appeals in this case, the Court reversed a three-judge district court ruling that the Interstate Commerce Commission had violated NEPA in approving the railroad's request for a general rate increase applicable to recyclables as well as to other commodities. The district court decided that an "oral hearing which the ICC chose to hold prior to its October 4, 1972, order [approving the railroads' request with some exceptions] was an 'existing agency review process' during which a final draft environmental impact statement . . . should have been available . . . ." 422 U.S., at 319-320. This Court's reasons for holding that the district court's decision was erroneous are particularly instructive here:

"NEPA provides that 'such statement . . . shall accompany *the proposal* through the existing agency review processes' (emphasis added [by the Court]). This sentence does not, contrary to the District Court opinion, affect the time when the 'statement' must be prepared. It simply says what must be done with the 'statement' once it is prepared—it must accompany the 'proposal.' . . . Under *this* sentence of the statute, the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action. Where an agency initiates federal action by publishing a proposal and then holding hearings on the proposal, the statute would appear to require an impact statement to be included in the proposal and to be considered at the hearing. Here, however, until the October 4, 1972 report, the ICC had made no proposal, recommendation or report. The only proposal was the proposed new rates filed by the railroads. Thus, the earliest time at which the *statute* required a statement was the time of the ICC's report of October 4, 1972—sometime after the oral hearing." 422 U.S. at 320-321 (emphasis is the Court's; footnotes omitted).

Thus this Court plainly held that NEPA does not mandate an impact statement by a federal agency prior to "the time at which it makes a recommendation or report on a proposal for federal action." The Court's *SCRAP II* holding applies here and in connection with the pending applications for federal approval of preference right leases and mining plans regarding federal coal lands in Utah where there has been no agency proposal for regional coal development.

III. The Decision of the Court of Appeals Regarding the Required Scope of An Environmental Impact Statement Conflicts With Decisions of Other Courts of Appeals.

The court below ruled that "when the federal government, through exercise of its power to approve leases, mining plans, rights-of-way, and water option contracts, attempts to 'control development' of a definite region, it is engaged in a regional program constituting major federal action within the meaning of NEPA, . . ." and it therefore held that "comprehensive major federal action is contemplated in the Northern Great Plains. The District Court's contrary conclusion of law was in error." (App. A, 39A). The sole judicial support for this proposition cited by the lower court's majority was "the *Conservation Society* precedent" and all the cases "relied upon by appellees and the District Court" were found to be "inapposite" since [n]one of the cases involved a direct challenge to the need for a regional EIS" (*id.* at n.29). Judge MacKinnon correctly described this as "a classic example of a distinction without a difference." (*id.* at 65A).

This Court has since vacated "the *Conservation Society* precedent" and remanded it "for further consideration in light of" *SCRAP II,* 44 U.S.L.W. 3199 (October 6, 1975). The State of Utah urges the Court to now clarify the matter and resolve the clear conflict among the circuits on a subject of utmost importance to the states, the federal government and private citizens alike.

We believe the decisions of the Ninth, Tenth, Fifth, and Seventh Circuits discussed below are clearly correct and that the lower court's decision here regarding

the appropriate scope of an environmental impact statement is clearly in error.

The decision of the Ninth Circuit in *Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F.2d 1275 (C.A. 9, 1971), is almost directly in point. There the plaintiffs contended that impact statements issued in connection with each of several coal-fired electric generating projects for southwestern states were invalid under NEPA because the statements were issued prior to completion of a Southwest Energy Study by the Interior Department. That Study, similarly to Interior's Northern Great Plains Resources Program study, "was designed to evaluate the problems created by further development of coal-fired electric power in the Southwest." The plaintiffs argued that "consideration of the Study is essential to evaluation of the environmental impact of the . . . projects in question." 471 F.2d at 1279. In rejecting that contention, the court stated, among other things:

> "It would appear that in initiating the Study, the Secretary was acting in concert with the aims of NEPA by attempting to expand the available store of knowledge pertaining to the environmental effects of the development of electric power facilities in the southwestern United States. Neither § 102(2)(B) nor (C) can be read as a requirement that complete information concerning the environmental impact of a project must be obtained before action may be taken. If we were to impose a requirement that an impact statement can never be prepared until all relevant environmental effects were known, it is doubtful that any project could ever be initiated. While appellants here have limited their argument to one specific piece of information, that does not solve the

> larger problem. At any point in time, there are likely to be any number of studies underway concerning a host of environmental or other societal problems. *What appellants seek is for this Court to substitute its judgment for that of the Secretary, who is charged by NEPA with preparing a thorough statement of the environmental consequences of a proposed project, as to what particular information will be required to complete that statement. We decline to assume that role." Id.* at 1280-81; emphasis supplied; footnote omitted.

Moreover, the plaintiffs' contentions were rejected with respect to a fourth project, which "is only proposed" and as to which "no federal action, major or otherwise, has been taken . . . since the effective date of NEPA." *Id.* at 1278. Thus, the court held that NEPA does not require a ban on individual projects until overall environmental studies are completed. And although in *Jicarilla,* all the coal-fired power projects were precisely identified and were related "geographically," "environmentally," and "programmatically," there was no suggestion that a "regional" impact statement was mandated.

And in *Environmental Defense Fund* v. *Armstrong,* 356 F.Supp. 131 (N.D. Cal. 1973), *affirmed,* 487 F.2d 814 (C.A. 9, 1973), *cert. denied,* 416 U.S. 974 (1974), the court rejected the plaintiffs' demand that it order a "comprehensive study" of the Central Valley Project in California and pending such a study enjoin one dam as to which an environmental impact statement, although completed, was challenged as inadequate in the absence of the demanded "comprehensive study." In rejecting these demands the court ruled that

> "So long as each major federal action is undertaken individually and not as an indivisible, in-

> tegral part of an integrated state-wide system, then the requirements of NEPA are determined on an individual major federal action basis. Plaintiffs' suggestion that there is need for a comprehensive study of the Central Valley Project should be addressed to the Congress, and not to the Court." *Id.* at 139.

Similarly, in *Sierra Club* v. *Stamm*, 507 F.2d 788 (C.A. 10, 1974), the Tenth Circuit Court of Appeals rejected an argument that the impact statement for the Strawberry Aqueduct and Collection System was "too narrow in scope, and should be a final statement at least for the entire Bonneville Unit, if not indeed, for the entire Central Utah Project." It had been authorized by Congress as "a plan to collect, develop and divert water in the Bonneville and Uinta Basins of Central Utah for municipal, industrial, agricultural and recreational purposes." *Id.* at 789. The Tenth Circuit affirmed the district court's finding that the Strawberry System "has an independent utility of its own" and "can operate and function separately from the remaining unconstructed systems of the Bonneville Unit or other units of the Central Utah Project." *Id.* at 791. On the basis of the district court's findings and in reliance upon the holdings of *Jicarilla* and *Armstrong, supra,* and *Sierra Club* v. *Calloway,* 499 F.2d 982 (C.A. 5, 1974), the Tenth Circuit concluded that the "Strawberry system in and of itself constitutes a 'major Federal action' and that it is not a mere increment of either the Bonneville Unit or the Central Utah Project requiring a final impact statement for something more than the Strawberry system." *Id.* at 792-93. The court below specifically declined to follow *Sierra Club* v. *Stamm* (App. A, 41A, n. 29). The *Calloway* case relied upon by the Tenth Circuit in *Stamm,*

likewise upheld an impact statement limited to one dam construction project. The lower court in *Calloway* had granted an injunction on the ground that the single dam project was not in and of itself an individual "major federal action" but merely "an increment of the much larger Trinity River Project." In reversing the lower court decision, the Court of Appeals ruled that

> "It was error to make Wallisville an evidentiary hostage of Trinity. The holding if permitted to stand could well spell the doom of the Wallisville Project in view of the uncertainties attending the Trinity Project." 499 F.2d at 993.

It is likewise erroneous and contrary to the congressional purpose in enacting NEPA for the court below to hold individual mining plan approvals of preference right lease applications as "an evidentiary hostage" of assumed regional development of the Northern Great Plains, however ultimately geographically defined, or of some other not yet conceived "region" for the development of much needed low sulfur coal resources in federal lands throughout the State of Utah and elsewhere.

As the Court of Appeals for the Ninth Circuit noted in *Daly* v. *Volpe,* 514 F.2d 1106, 1110 (C.A. 9, 1975), "it is important to keep in mind that although Congress has mandated that environmental exigencies must be considered by an agency, Congress has nowhere determined that such considerations must work to the abandonment of other federally mandated goals and projects." See also, *Indian Lookout Alliance* v. *Volpe,* 484 F.2d 11, 19 (C.A. 8, 1973); *Swaim* v. *Brinegar,* 517 F.2d 766, 776, n.12 (C.A. 7, 1975); *Friends of*

the Earth v. *Coleman,* 513 F.2d 295 (C.A. 9, 1975); and *Trout Unlimited* v. *Morton,* 509 F.2d 1276, 1284 (C.A. 9, 1974).

The State of Utah respectfully submits that this case is an especially appropriate one for explicit recognition of this too-often neglected principle by some lower federal courts.

As the federal petitioners have demonstrated through affidavits submitted to the Court in support of the Solicitor General's Application for A Stay Pending Review on Writ of Certiorari, "[r]ecent international incidents threatening the security and availability of non-domestic energy supplies have led to Presidentially established goals of reduced dependency on costly and ofttimes unreliable foreign imports. These goals have amplified the demand for domestic coal production and use . . . the President announced a major commitment to increase development and use of our domestic energy, of which coal is our most abundant resource. The Secretary of the Interior has been directed by the President to *take actions to insure rapid production* from existing leases *and to make new, low sulfur coal supplies available.*" (Affidavit of Secretary of the Interior, Thomas S. Kleppe, A. 188, emphasis supplied).

Moreover, Congress has likewise recognized and acted upon the importance of the Nation's coal resources in achieving energy independence. Congress passed the Energy Supply and Environmental Coordination Act of 1974. (P.L. 93-319). Pursuant to that Act, the Federal Energy Administration is authorized to, among other things, prohibit certain power plants and major fuel consuming installations from burning natural gas or petroleum products as their primary

energy source and to require that power plants be designed and constructed so as to be capable of burning coal as their primary energy source.

As pointed out in the Affidavit of Federal Energy Administrator Zarb, on file with the Court in this case, "[i]f the United States is to achieve a reasonable degree of energy self-sufficiency, coal production will roughly have to double over the next decade. Our goal is production of slightly more than a billion tons of coal annually by 1985—the equivalent of opening a million and a half ton mine every week for the next ten years." (Zarb Affidavit, A. 207). The FEA Administrator further stated that "[t]o achieve necessary increases in coal production to meet national goals, prompt federal decisions on additional coal development are essential" and noted that "from a decision to proceed ahead, it still takes approximately three years to open a large surface mine and five years to open an underground mine." (*id.* at 208).

In their Reply Memorandum, submitted in answer to the respondents' Brief in Opposition to Grant of Certiorari, the federal petitioners acknowledged that it took them more than three years to complete their National Impact Statement on Coal Leasing (Coal Leasing EIS), which they candidly acknowledged "analyzed environmental effects in less depth than respondents apparently demand of a regional impact statement, ..." (Reply Memo. at 3). The federal petitioners further estimated that any "regional" impact statement would likewise take "approximately three years" and of course recognized that the adequacy of such a statement "could become the subject of a challenge in the courts." (*id.*) This case has already consumed nearly three years since the re-

spondents filed their complaint and it is not yet completed.

The federal petitioners stated quite clearly in their Petition for a Writ of Certiorari that:

> ". . . the program of impact statements for individual mines, local groups of mines, and the nation as a whole, adequately fulfills the commands of Section 102(2)(C). It is not necessary to suspend the development of coal resources for several years more while the government prepares a 'regional' impact statement as the price of continued 'contemplation.'" (p. 21).

The State of Utah fully agrees with this position of the federal petitioners. Utah is vitally interested in an early resumption of federal coal leasing. This interest is by no means to be taken as any indication that the State is insensitive to or unmindful of the need to protect the environment. Indeed, Utah has in effect substantial legislation that we believe is more than adequate for mined land reclamation, environment and safety and that either equals or exceeds the standards imposed by the Federal Government. But the fact remains that the economic vitality of the State is critically dependent upon an adequate and secure supply of energy and that the principal fuel source in the State of Utah for the provision of energy to all of its citizens is coal. The Federal Government and the State are both fully cognizant of the fact that the extensive coal reserves embedded in federal lands throughout the State of Utah are both of high quality and low sulfur content.

The time has come, we respectfully submit, for the Federal Government to be free to issue the coal lease applications that have been pending before the federal

petitioners for several years in order that the substantial quantities of low sulfur coal within the State may be mined for the benefit of the citizens of Utah and in furtherance of the President's and the Congress' goal of energy independence for the United States.

Even if the federal petitioners were to issue coal leases tomorrow, it would still be at least five years before the underground mines that would be utilized in Utah would be open for production. Certainly the issuance of an environmental impact statement for each individual mine, or local groups of mines, against the backdrop of the nationwide federal impact statement will satisfy the legal requirements imposed by NEPA. Should the respondents desire more than present law requires, their arguments "should be addressed to the Congress, and not to the Court." ***Environmental Defense Fund*** v. ***Armstrong,*** 356 F.Supp at 139.

CONCLUSION

For the foregoing reasons, the State of Utah, as *amicus curiae,* urges the Court to reverse the decision of the court below and to remand the case with instructions to affirm the Judgment of the District Court.

Respectfully submitted,

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